No. 10748.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN CULJAK AND JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, Contractors, Inc., a corporation,

Appellees.

BRIEF OF APPELLANTS.

FRANK J. BRAUN,
Los Angeles, California;
CONNER & JONES,
By GERALD JONES,
Tucson, Arizona,
Attorneys for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Jurisdictional Statement.

Throughout this brief the parties will be referred to as "plaintiffs" and "defendants."

This appeal is taken from a judgment of the District Court of the United States in and for the District of Arizona, at Tucson, entered and filed October 7, 1943 [R. 138-139], in that certain action wherein Martin Culjak and Joseph Zelko, each a citizen and resident of the County of Los Angeles, State of California, were plaintiffs in a complaint [R. 2-5] praying for a money judg-

ment in the sum of $3600.38 against Del E. Webb, a citizen and resident of the County of Maricopa, State of Arizona, and White & Miller, Contractors, Inc., an Arizona Corporation with its principal office and place of business at the County of Pima, State of Arizona, defendants; and from the order of said United States District Court, rendered and made on November 29, 1943, denying plaintiffs' motion for a new trial, to strike and amend findings of fact, conclusions of law and for judgment for plaintiffs [R. 140-144].

The Notice of Appeal to this Court was duly served on defendants, filed in said United States District Court on February 25, 1944 [R. 144-145]. Plaintiffs' bond on appeal was filed on February 25, 1944.

The jurisdiction of said United States District Court arose from Article III, Section 2, Constitution, and Section 24, Judicial Code, as amended (Section 41, U. S. C. A.). The jurisdiction of this Court arises by virtue of Section 128, Judicial Code, as amended (Section 225, U. S. C. A.).

Statement of the Case.

Plaintiffs owned an Austin Trenching Machine valued at $20,000.00. In the latter part of November, 1940, an agent of the defendants named Morrison entered into negotiations with the plaintiff Martin Culjak for the rental of said machine for use in digging trenches for sewer and water lines at Fort Huachuca, Arizona. Culjak did not know where Fort Huachuca was. He asked Morrison if there was any rock in the ground, and Morrison said, "No rock, but some hard clay." Culjak then said, "If that is the case, I rent you the machine."

There was no written contract when the machine was delivered to defendants. About a week or ten days thereafter, the written contract attached to plaintiffs' complaint as Exhibit A was forwarded by defendants to plaintiffs [R. 28-30].

The machine at the time of its delivery to defendants was in first-class condition throughout [R. 81, 118].

The contract provided that all necessary minor or field repairs to the machine while in use by defendants should be made by defendants without cost to the plaintiffs, and that other than minor or field repairs should be made by plaintiffs without cost to defendants [R. 7]. The machine was to be operated by employees of the defendants [R. 7].

The machine was returned to plaintiffs at Los Angeles the latter part of April, 1941, in a badly damaged condition [R. 53].

On May 7, 1941, plaintiffs wrote a letter to defendants calling their attention to the damaged condition of the machine upon its return to plaintiffs, and asking defendants to make certain necessary specified repairs thereon [R. 35].

Defendants, upon receipt of plaintiffs' letter, requested Harry C. Collins, a machinery expert in Los Angeles, to inspect the machine and report its condition and the necessary parts to put it in first-class operating condition [R. 72].

Collins made an inspection of the machine on Sunday, May 11, 1941, at Van Nuys, California. He found the track pads which carry the machine and guide it along the ground badly bent. The wooden parts of these pads

were broken down and the steel casings which enclosed those wooden parts had heavy indentures. His examination disclosed that the surfaces of the multipedal pads exposed to the road or the surface of the ground were indented at irregular points on each tread. It was his opinion that pads in that condition would not run true and would not carry the machine in a straight line. He found the excavating chain links bent in places and stretched out of pitch so that they did not properly connect and go over the sprocket they were intended to go over, but would jump off and break. He found other parts of the machine in damaged condition. He made a written report of his findings and recommendations to defendants, in which he stated that he found 102 links of the excavating chain bent, drawn out of shape or worn down to a point where they were dangerous to operate, and 82 tractor or multipedal pads "all in very poor condition" [R. 72-76].

Defendants notified plaintiffs in the latter part of June or first of July, 1941, that they would not make any repairs to the machine. The plaintiffs thereupon engaged an attorney who, on July 8, 1941, wrote to defendants urging them again to make the necessary repairs, it being the desire of plaintiffs to have defendants themselves, rather than plaintiffs, repair the machine [R. 64-65]. Neither the attorney for plaintiffs, nor plaintiffs themselves got any reply to or acknowledgment of the said letter of July 8, 1941. On July 26, 1941, plaintiffs gave an order for the necessary repair parts which were furnished about thirty days later and then installed.

The parties stipulated that materials and parts, of the value of $2021.05, were purchased and used in making

repairs and that the labor cost of said repairs was $498.75, but defendants did not admit that all of said labor and materials were necessary to place the machine in good order [R. 17-19, 23]. It took 30 days to repair the machine [R. 38].

At the time the machine was returned from Fort Huachuca to plaintiffs, plaintiffs were engaged in excavation work for sewers upon which they needed the machine. In order to make it operate, pending repairs, even in the soft loam ground where this excavation work was being done, plaintiffs had to take out every other tooth in the sprocket. When those sprocket teeth were removed, the excavator chain still jumped the sprocket at times [R. 39, 56]. This excavation work was being done on a new subdivision and not on a paved street [R. 39]. It could not be used on a job that had pavement because the damaged track pads would dig up the pavement. When the machine came back from Fort Huachuca, the damaged track pads of the caterpillar roller upon which the machine traveled over the ground would buckle up and the caterpillar roller would then slide and pull the machine off the line it was intended to follow. Several times it had to be pulled out of the trench, backed up and set straight [R. 39, 55-56]. Before going to Fort Huachuca, the machine would not damage pavements [R. 33].

Although plaintiffs had it on the ground where the sewer work was being done from the end of April, 1941, to sometime in July, 1941 [R. 43-44, 113], it actually was operated only about 80 hours during that time, running at different times a few hours a day [R. 124] and being moved from one place to the other by truck and trailer [R. 129].

The plaintiffs could have rented the machine at in excess of $1500.00 per month during the time it was being repaired [R. 39-40].

The bill of particulars filed in the case alleged that for making said repairs 82 multipedal slats and bolts, 2 idler shafts and 150 excavator chain links were purchased. The correct number of excavator chain links actually installed, however, was 180, of which 30 links were taken from plaintiffs' own supply [R. 32, 37].

Defendants' answer admitted the allegations of the complaint as to the lease and the good condition of the machine when leased, but denied that it was returned in a damaged condition or that plaintiffs were damaged [R. 2-22].

The case was tried without a jury. At the conclusion of the trial the Court apparently was satisfied from the evidence which was uncontradicted on material points that plaintiffs were entitled to damages in the amount expended for materials and labor for repairing the machine because the Court requested plaintiffs to file a memorandum *only* upon the plaintiffs' right to rental for the machine while being repaired [R. 149]. However, judgment was ordered for defendants and proposed findings of fact and conclusions of law were prepared and filed by defendants [R. 133-136]. Objections to these were duly filed by plaintiffs and were by the Court denied [R. 137]. Upon the entry of the judgment, plaintiffs filed a motion for a new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs which the Court denied [R. 140-143]. Notice of appeal to this Court was thereupon duly given by plaintiffs [R. 144-145].

Findings of Fact.

Briefly stated the findings of fact were substantially as follows:

(1) A finding of diversity of citizenship and that the claim involved exceeded $3000.00.

(2) A finding that planitiffs and defendants entered into a contract of lease as alleged in the complaint.

(3) A finding as to the date of the purchase of the machine by plaintiffs, the extent of its use by plaintiffs before its lease to defendants and that "when said machine was delivered to defendants it was in a condition to render efficient, economic and continous service."

(4) A finding that the contract provided that "All necessary minor or field repairs to equipment shall be made by the lessee without cost to the lessor. Other than minor or field repairs shall be made by the lessors without cost to the lessee."

(5) A finding that in December, 1940, the machine was transported by defendants at their expense from Los Angeles, California, to Fort Huachuca, Arizona.

(6) A finding that the machine was operated at Fort Huachuca by defendants from its arrival until on or about April 7, 1941.

(7) A finding "That during the time said machine was at Fort Huachuca, the defendants furnished and paid the operators thereof and in addition expended the sum of $4,211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of $8,250.00 in rentals.

(8) A finding "That at the termination of said operations the necessary minor or field repairs were made on the machine and it was then returned to the plaintiffs at Los Angeles at defendants' expense, and shortly thereafter, on April 28, 1941, it was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was operated until May 7, 1941, when it was moved over to the Magnolia Boulevard job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941 when it was returned to plaintiffs' yards in Los Angeles."

(9) A finding "That the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California."

Conclusions of Law.

The conclusions of law were:

(1) "That the defendants, in accordance with the terms of the contract, made all necessary minor or field repairs before delivering said machine to plaintiffs.

(2) That the plaintiffs are not entitled to the damages prayed for in their complaint or at all.

(3) That the defendants are entitled to a judgment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly."

Specifications of Error.

Plaintiffs make the following assignments of error:

1. The Court erred in making finding of fact 3, wherein it is stated, "that said machine was purchased by said plaintiffs and Pat Devine in 1930, and was operated about 10 or 11 months between 1930 and 1940, and for the last seven years of that time had stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years" [R. 134], in that said finding is immaterial and misleading and was not an issue in the case.

2. The Court erred in making finding of fact 7, wherein it is stated, "that during the time said machine was at Fort Huachuca, the defendants furnished and paid the operators thereof and in addition expended the sum of $4,211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of $8,250.00 in rentals" [R. 134-135], in that said finding is immaterial and was not an issue in the case.

3. The Court erred in making that portion of finding of fact 8, wherein it is stated, "that at the termination of said operations, the necessary minor or field repairs were made on the machine" [R. 135], in that said portion of said finding is not supported by any evidence and is contrary to the undisputed evidence in the case.

4. The Court erred in making that portion of finding of fact 8, wherein it is stated that "on April 28, 1941, it (the machine) was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was operated until May 7, 1941, when it was moved

over to the Magnolia Boulevard job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941, when it was returned to plaintiffs' yards in Los Angeles" [R. 135], in that said portion of said finding is immaterial and not involved in any issue in the case, and is uncertain and misleading.

5. The Court erred in making finding of fact 9, wherein it is stated "that the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California" [R. 135], in that said finding is immaterial and not involved in any issue in the case, and is misleading.

6. The Court erred in making conclusion of law 1, wherein it is stated, "that the defendants, in accordance with the terms of the contract, made all the necessary minor or field repairs before delivering said machine to plaintiffs" [R. 135], in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

7. The Court erred in making conclusion of law 2, wherein it is stated, "that the plaintiffs are not entitled to the damages prayed for in their complaint or at all," in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

8. The Court erred in making conclusion of law 3, wherein it is stated, "that the defendants are entitled to

a judgment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly" [R. 135-136], in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

9. The Court erred in refusing to permit plaintiffs to amend their complaint at the trial to permit proof of additional damages arising from injuries sustained by said machine while in the possession of defendants which defendants had not repaired and which damages by inadvertence had not been specially pleaded, unless plaintiffs would consent to a continuance of the trial [R. 54-55], in that said refusal was arbitrary and unjust and an abuse of the Court's discretion.

10. The Court erred in failing to award judgment for plaintiffs, in that the law and undisputed evidence showed plaintiffs to have been damaged in the sum of at least $4,166.80 and entitled to judgment for at least that amount.

11. The Court erred in denying plaintiffs' motion for a new trial, to strike and amend findings of fact and conclusions of law, and for judgment for plaintiffs [R. 140-143].

ARGUMENT.

Three basic questions of fact and two questions of law are involved in this case.

Facts.

(1) What was the condition of the trenching machine when leased by planitiffs to defendants?

(2) What was the condition of the machine when returned by defendants to plaintiffs?

(3) What repairs, if any, were necessary to be made upon said machine upon its return to plaintiffs?

Law.

(4) What was the obligation of the defendants, under the contract of lease, with reference to repairs of the machine?

(5) Was there abuse of discretion by the trial court in refusing to permit a trial amendment of the complaint to allow proof of other injuries to the machine not specifically pleaded?

Argument upon these five questions will cover all the specifications of error heretofore assigned.

POINT I.

First Assignment of Error.

What Was the Condition of the Machine When Leased to Defendants?

Finding of fact 3 states that the machine was purchased by plaintiffs in 1930, was operated about 10 or 11 months from 1930 to 1940, and for the last seven years of that time stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years [R. 134].

The purpose of this finding must have been to establish as a fact that, because the machine had had no repairs for ten years and had stood for the last seven years in plaintiffs' yards—inferentially, in the open weather,—it must have been ready to fall apart when leased to defendants. If this was not the purpose of the finding, then the finding was wholly immaterial.

It is true the machine "stood in the yards" of the plaintiffs during many years of the pre-war depression when contract work was practically halted; but it was stored in a galvanized shed, well protected. The tracks were planked up with 12 inch planks [R. 41, 48, 57].

The track pads could not have become deteriorated by age because the wood which was encased in steel was specially prepared. Devine testified: "The wood in those pads is oak or hickory. This wood is first kiln-dried to take the shrinkage out of it. They then put it in a press and drive it through a frame press, small at one end and

bigger at one end, and they press it through that. That's to take up any slack in it. They undertake to thoroughly dry the wood. They next put it in a big vat of linseed oil, to save it from expansion, contraction or rot and also to waterproof it. This is done to protect it from rotting or expansion. If it is waterproofed, it will not take up water and will not expand. "That wood is thoroughly dried before it is put in the pad. It will last for years. You could bury it in the ground and it would last for years,—fifty years—because it cannot take up any moisture." [R. 126.]

The machine was new when plaintiffs purchased it after having been used only about six weeks by a previous purchaser who had defaulted in his payments [R. 47-48]. Pat Devine, a co-owner of the machine, watched out for the machine while it was stored [R. 57, 61]. If it had not had any repairs during the ten years plaintiffs owned it, it must have been because it needed no repairs. It had done an aggregate of only 10 or 11 months' work during those 10 years and such work was in and about Los Angeles in soft soil without rocks [R. 62].

The evidence as to its excellent condition when leased to defendants is wholly undisputed. The most convincing testimony in that respect was given by witnesses on behalf of the defendants.

Harry C. Collins testified that when he inspected the machine for a prospective lessee 30 days before its delivery to defendants (and it was not operated in the meantime) he found it "in first-class condition throughout. . . . The tractor pads were in first-class condition. They showed no appreciable wear." This was true also as to the buckets and gears and engine [R. 81].

W. A. Brownfield testified that "the machine was in very good shape at the time it was delivered at the project" [R. 96].

Dan Cavanaugh testified he saw the machine when it came on the job and that "it was in very good condition" [R. 117-118].

Defendants valued the machine in the lease contract at $20,000.00 [R. 14]. In their answer [R. 22], they admitted the allegation of the complaint that when received by them it was "in a condition to render efficient, economic and continuous service" [R. 4]; yet in their original draft of finding 3 they omitted this admission and only included it upon the special order of the Court [R. 137]. It is not necessary to add to this evidence the testimony of plaintiffs' witnesses on that matter [R. 31, 32, 33, 49].

POINT II.

Second, Third and Sixth Assignments of Error.

What Was the Condition of the Machine When Returned to Plaintiffs?

Finding of fact 7 stated that while the machine was at Fort Huachuca, the defendants paid the operators thereof and also paid $8250.00 in rentals [R. 134-135]. No issue was raised in the action as to the payment of the operators or for rentals. Consequently, said findings were wholly immaterial.

Finding of fact 7 further states that defendants expended $4211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running order [R. 134-135]. The amount of money paid by defendants for repair of the machine was not an issue in the case, and, so, this finding was also immaterial. But

if it was intended to imply by said finding that all necessary minor or field repairs had been made on the machine when it was returned to plaintiffs, then such finding was contrary to all evidence in the case and was not supported by any competent evidence; and this is true of conclusion of law 1 [R. 135].

The undisputed evidence is that when the machine was returned to plaintiffs, it was, as the complaint alleged, "in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service" [R. 4].

(a) Plaintiffs' Witnesses:

Martin Culjak, one of the plaintiffs, testified that when he saw the machine at the Southern Pacific Freight Depot in Los Angeles upon its return from Arizona, he just glanced over it and could see all the chains were bent and the buckets shot [R. 33]. He saw the multipedal pads were in bad condition, pretty well shot. The wooden blocks inside were all stripped and the iron cover on the pads was all bent in different directions. The buckets were all patched up and there were loose rivets on the caterpillar links. They were pretty well bent and stretched out of shape [R. 34]. Culjak testified that plaintiffs could not use the machine on any job that had pavement because the damaged and bent track pads would dig up the pavements and they couldn't use it economically even on unpaved ground because it pulled off to one side and they had extra work to get the ditch right [R. 39]. The transmission gears were stripped, he said, and the transmission shaft was cracked [R. 42-45].

Pat Devine, another witness for plaintiffs and a co-owner of the machine, produced one of the damaged track

pads at the trial. It was too cumbersome to be offered in evidence. He testified that said damaged track pad was all cracked up and spread too wide; that when the damaged pads lie flat on the surface, they buckle together, owing to the spread and because there is no play between the pads. He said the damaged pad he exhibited in Court was all dented and would cut up the streets, and that if used on dirt surfaces one would have to build the filler and bring it up to pitch [R. 50]. As to the remaining 81 pads in the machine when it got back from defendants, 65 of them would fall apart. They were mostly worse than the sample he had in Court, but some may have been a little better. He had to go through a whole pile of them to get one that was whole [R. 51].

Not many of the 180 links on the excavator chain were good when plaintiffs got the machine back. Some of them would look good until you tapped them to see whether they were fractured or not. Ten or eleven links out of the 180 could be used by changing the pins and bushings [R. 57].

Also the upper structure of the boom had been pulled down and this threw the tail block 3 inches off from the center of the ditch [R. 53].

(b) Defendants' Witnesses:

Harry C. Collins, who at the request of defendants, made a special inspection of the machine, soon after it returned to Los Angeles, testified that he found the track pads which carry the machine badly bent. The wood parts were broken down and the steel casing over the wood had heavy indentures putting them out of shape. Pads in that condition, he said, would not run true [R. 72]. The excavator chain links were bent and pulled out of pitch. When out of pitch the chain will jump off the sprocket

[R. 73]. Some of the links were elongated so that they would not mesh with the teeth of the sprocket. The idler rolls that guide the chain were badly worn [R. 74].

W. A. Brownfield testified that the pads on the track were in "terrible shape." When the hinges were taken off the pads, the wood just all fell apart [R. 100]. The treads on the track were pretty badly mashed up [R. 101]. He said he helped take the pads off the machine and saw the wood inside the pads fall to pieces. The pads were in much worse condition than ordinary wear and tear would make them [R. 102]. The pads at the time the machine was repaired at Fort Huachuca before being shipped back to Los Angeles were in very bad shape [R. 106]. The excavator chain was approximately 75% good, but he did not measure the links [R. 100]. Twenty-five percent of the links were in bad shape [R. 108], after 20 new links were placed on the chain by defendants at the conclusion of the operation [R. 109]. The 25% were bowed or bent and these would put an undue strain and wear on the head sprocket and would cause the other 75% to become damaged because if one link on one side of the sprocket is good and a link on the other side is stretched, the whole chain is pulled out [R. 110]. The witness called the damaged condition of the buckets to Mr. Cavanaugh's attention and told Cavanaugh plaintiffs would probably not accept the buckets [R. 110]. He also called Cavanaugh's attention to the treads on the track [R. 101].

The defendants relied at the trial mainly upon the testimony of Leslie H. Snelling as proving that all necessary minor or field repairs had been made by defendants on the machine, and that it was in good working condition when returned to plaintiffs. The direct testimony of this

witness was in the form of a general written statement prepared for his signature. In this statement he said, "So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over here, without any major difficulty and no breakdowns of any consequence [R. 114].

However, on cross-examination, this witness testified that as a city inspector on sewer contract work he was not concerned with the manner of operation of a machine so long as the work was done according to specifications [R. 115]. He was not a mechanical engineer and knew nothing of the different parts of the machine [R. 115]. He was not offered, and did not qualify, as an expert witness. He said that the reason he stated in his written statement that the machine seemed to be in reasonably good condition when brought back from Arizona was that there were no breakdowns [R. 116]. He didn't even inspect the machine [R. 116] and never looked at the track pads [R. 117]. He did, however, call the attention of the contractors several times during the work to the fact that they were deviating from the line of the sewer and made them get back on the line [R. 116]. When asked on cross-examination what justification he had for the declaration in his written statement: "So far as I could tell from watching the machine operate, it seems to be in

a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona," he answered, "I didn't inspect it. I made that statement as they asked me. As a matter of fact, there could be a lot wrong with that machine and I would never know about it, even if I inspected it" [R. 116-117].

And on redirect examination by the defendants' counsel he further stated he never looked at the track pads on the machine. He attempted to explain the deviation of the machine from its course as due to either of two causes: the wet condition of the ground, or the fact that tracks on the digger were not even [R. 117]. However, since he was not qualified to give an expert opinion on the matter, his explanation has no value as evidence. But if it were to be considered at all, it must be assumed in the absence of proof, which does not exist to the contrary, that the ground was wet on both sides of the ditch and hence a 40 ton machine would be most unlikely to slide from one side to the other. The more likely reason, therefore, would be that the tracks of the digger—the multipedal track pads—were uneven and were, as testified by Devine [R. 55] buckling up and pulling the machine off its course. It is a matter of common knowledge that when one wheel of a machine, as an automobile, buckles or locks and is unable to revolve, the wheel on the opposite side turns the machine on the pivot of the locked wheel and away from its intended course.

Consequently, the testimony of Snelling cannot be taken as contradicting the testimony of the other competent witnesses or as proving that the machine was not in a damaged condition when it was returned to plaintiffs.

The witness, Dan Cavanaugh, was defendants' superintendent of the operations at Fort Huachuca. He does not contradict the testimony of Culjak, Devine and Browning as to the damaged condition of the machine when returned to plaintiffs. If anything, he supports it. He said with reference to the condition of the multipedal track pads when the machine was returned to plaintiffs, "I am sure if these wooden pads would have been good, we would not have the condition we have now" [R. 122], namely, the damaged condition described by the other witnesses. A more positive statement was, "I would not say, due to the terrain, that the damage done to those pads could be considered ordinary wear and tear" [R. 123].

The statements of Cavanaugh certainly acknowledge that the machine was returned in a damaged condition at least as far as the track pads were concerned.

The uncontradicted evidence establishes, therefore, that when the machine was returned to plaintiffs, it was in a damaged, deteriorated and unfit condition and was not in the condition in which it was received by the defendants, ordinary wear and tear excepted.

The extent of those damages will be discussed under the next point.

POINT III.

Fourth and Fifth Assignments of Error.

What Repairs Were Necessary Upon the Machine When Returned?

Finding of fact 8 states in part that on April 28, 1941, the machine, upon its return from Arizona was placed in operation on a sewer job in Van Nuys, California, where it was operated until May 7, 1941, when it was moved to another job and operated there until May 13, 1941, and was then moved back to the Van Nuys job and kept in operation there until the completion of said job on July 21, 1941, when it was returned to plaintiffs' yards in Los Angeles [R. 135]. Either this finding is immaterial, as not decisive of any issue in the case, or it is offered as a finding that when the machine was returned to plaintiffs, no repairs were necessary thereon.

Along the same line is finding of fact 9 which states that the plaintiffs made no repairs on said machine until the period between August 28 to September 16, 1941 when they made *major* repairs on it at their yards in Los Angeles [R. 135]. We have emphasized the word "major" because we will discuss later the implied contrast suggested thereby.

Both findings 8 and 9, as we understand them, were intended to declare that the machine was in good working order when returned to plaintiffs, having had all necessary minor or field repairs made thereon by the defendants, and that, therefore, no repairs were needed thereon, until plaintiffs between August 28 and September 16 made "major" repairs thereon. It must, however, be assumed that those major repairs were then needed. Otherwise almost $3,000.00 would have been wasted by

plaintiffs since there was no profit or expectation of profit to them in making unnecessary repairs, and besides, since they did their level best to have defendants themselves make the repairs [R. 35-36, 64-65].

The implication of the two findings under this point is that because the machine was operated for some 9 or 10 days' actual work in soft loam [R. 39, 55, 61], after its return to plaintiffs it must have been in a condition to render efficient, economic and continuous service, and that because of having been operated for 9 or 10 days in soft loam, it became so damaged that it was necessary to make major repairs costing almost $3,000.00 for parts and labor.

The machine was returned the last of April 1941. Approximately a week later, May 7, 1941, plaintiff Culjak wrote defendants a letter [R. 35-36] setting forth the injuries which he claimed the machine had suffered and asking defendants to make repairs. He was moderate in his request, in that he did not ask for any repairs to buckets and other damaged parts but only to those parts which were vital to the operation of the machine. At the time this letter was written, the plaintiffs had a sewer job in which a machine of the size of the machine just returned to them was needed. To rent a machine would cost them $1500.00 which they might properly claim from defendants. But they desired to avoid such expense. Their operator Devine, with ingenuity characteristic of good American workmen, by makeshift adjustments, managed to get the machine to work, although defectively. Devine testified:

> "After the trenching machine came back from Fort Huachuca, it was used by the plaintiffs. I operated it in Long Ridge Avenue and in Van Nuys.

It was there about 2 days, I guess. The ground was soft solid loam. I operated the machine there, but not very efficiently because the track pads would buckle up like this (illustrating), and the cat roller would come up and it would slide and it would go to the front end, pull off of the line for you. It pulled out several times and I had to go back up and straighten out before I could go ahead.

"I took every other tooth out of the sprocket in order to give it a slack, so it would not buckle up, and even if she would, I could handle her. It was a 6 point sprocket, 6 flat points, and then a square point, and the teeth are in the square point, and by taking the teeth out, I gave it slack.

"The sprocket was supposed to have 6 teeth in each for proper use. There were 12 on and I cut it down to 6. Then with the 6 teeth in the 2 sprockets, she jumped a sprocket twice on me. If the links were right she would not jump the sprocket. * * *

"It would not make a true straight trench. I slacked the chain off of it and put on 2,000 pounds in front as a counter-balance on the front end, to try to hold her in line. That was necessary to keep the front wheels from sliding and also I put grabs on the front wheels.

"When one track is locked, she will pull away—too much pressure on one side. That was due to the damaged condition of these pads" [R. 55-57].

This testimony is definitely supported by the machinery expert, Collins, who inspected the machine, not after it had finished the work on or about July 21, 1941, but on May 11, 1941, when the machine had done only 50 feet, "just probably a couple of hours' work" [R. 72]. Certainly, without definite proof, it cannot be inferred

that an operator like Devine who had operated this same machine during all the time it was operated while owned by the plaintiffs and who never in all that time broke even one link in the excavator chain or did any damage whatsoever requiring repairs to the machine [R. 53] would so damage it in 9 or 10 days' operation in soft loam as to make major repairs necessary. At the risk of being repetitious, we quote again from Collins' report of inspection as the machine had just got set to do its first work after returning from Arizona [R. 72]:

> "There were 102 excavating chain links that were bent, drawn out of shape, or worn down to a point where they were dangerous to operate. * * * I have found that 82 tractor pads are all in very poor condition" [R. 75].

It may be argued that plaintiffs, by setting the machine to work upon its return from Arizona, thereby accepted it as in good condition. But the contrary of such acceptance is shown by their prompt notification to defendants of the damaged condition and by their demand upon defendants to make repairs [R. 35]. Plaintiffs had good reason to expect that defendants would make said repairs, inasmuch as they commissioned Collins to make an inspection and to report to them "what parts were necessary to put the machine in first-class operating condition" [R. 72]. Had plaintiffs refrained from using the machine, pending negotiations with defendants for its repair, they would have been obliged to rent another like machine at $1500.00 per month and this cost they could very properly charge against defendants. But they acted with utmost good faith and out of consideration for defendants by thus minimizing the damages. They could

not stop work on their sewer contract with the City of Los Angeles. It is to be presumed that said contract had the usual provisions for penalties for failure to complete it within a specified time. Instead of being condemned by defendants for making emergency adjustments and putting the machine to work, they should be commended for their good faith and considerateness.

When it became evident that defendants would not make the repairs, plaintiffs ordered the necessary repair parts. The evidence is uncontradicted as to the cost of these and of the labor necessary to install them. The parts ordered and their respective costs and the labor costs are as follows:

82 multipedal bolts and slats	$1199.33
2 idler shafts	30.90
150 excavator links	757.05
30 excavator links	147.00
Pioneer Blocksmith and Welding Co. (cutting bolts)	33.77
Labor	498.75
Total	$2666.80

All of the above, with the exception of the item "30 excavator links" were set forth in plaintiffs' bill of particulars [R. 17-19] and it was stipulated that the list thus set forth correctly reflected the cost of the labor and materials expended by plaintiffs in repairing the machine after its return to Los Angeles from Fort Huachuca [R. 23]. As we have previously stated, 180 and not 150 excavator chain links were actually installed.

There is some discrepancy, though not contradiction,

in the testimony as to the number of links necessary to repair the excavator chain. Collins reported to defendants that 102 new links were necessary, and that there were 150 links in the chain [R. 75]. However, it is clear from the evidence that Collins was in error as to the number of links in the chain. His mistake can be accounted for by the fact that when he made the inspection the boom of the machine was down in a 9 foot trench, so that at least 18 feet of the revolving endless excavator chain was covered with dirt [R. 129]. Brownfield [R. 97], Culjak [R. 37] and Devine [R. 52] all testified there were 180 links.

When Collins was asked why he had sold plaintiffs 150 links after having stated that only 102 were necessary for repair of the chain, he said: "I am always anxious to see a machine operating successfully, and I know that it would not give the best results where you get some poor links and a lot of new ones, and the labor of making that change very often will save the amount of links that you would put in. I would say it would be very nearly as costly for the plaintiffs to have installed 102 links as to install a complete chain of 150 links" [R. 83]. Devine testified substantially to the same effect. He said that where you pick out a good link here and there from a chain of damaged links you would have to take out the bushings and get new pins. In doing that, the question of labor involved would be an even break [R. 57] since the new links come in 20 foot sections [R. 58]. Devine was of the opinion that Collins could not thoroughly inspect the machine by a casual inspection of one hour. He said you have to tap the chain with a hammer as he did, because a lot of them would look good but you would have to tap them to see whether they were fractured or

not. Devine, after a thorough inspection found only 9 or 10 good links in the old chain [R. 52]. Brownfield was of the opinion that 25 per cent of the links were in bad shape when the machine was returned to plaintiffs [R. 108]. These were bowed or bent so as to be readily noticeable. However, even a trained operator, he said, couldn't detect with the naked eye particular links, unless he watched them go over the sprocket or put a square on the link, or a rule or calipers [R. 110].

There can be no doubt whatever that repairs were necessary. All the competent witnesses admitted that the 82 multipedal pads should be replaced. Brownfield said 25% of the chain links should be replaced, but it was apparent that his estimate was based upon an inspection with the naked eye which he admitted was insufficient. Collins did not see the entire chain when he said 102 links would be sufficient to install. Only Devine made a complete and thorough examination and he found that only 9 or 10 good links were in the old chain and that the labor cost of taking these out of the old chain, removing the bushings and putting in new pins would be "an even break" with the cost of installing 9 or 10 new links. This appears to be sound reasoning. The evidence was undisputed as to the 2 idler rolls and as to the labor costs.

We think the evidence taken as a whole warrants only one reasonable conclusion, namely, that all of the parts we have listed as having been installed and all of the labor expense were necessary to restore the machine to as good condition as when leased to the defendants, ordinary wear and tear excepted.

But defendants contended there was no need for so many links being installed. They offered in evidence a

list of parts installed by them during the period of lease. Among these was a total of 123 excavator chain links [R. 24-26]. Ordinarily that would be a surprisingly large number for only approximately 128 days' operation of the machine, in view of the fact that during 10 or 11 months', or approximately 330 days', operation by plaintiffs from 1930 to 1940 not even one excavator link was installed; but we are not so surprised when we recall that the machine was operated during those 128 days in extremely rocky ground and, most of that time, on a night shift also. We are less surprised when we recall the testimony of Browning who operated the machine for defendants that, because of the rocks getting into the chain line, they had to replace as many as 4 or 5 or even 6 links a day [R. 97, 98]. These replacements were only when a link broke [R. 98]. Evidently, a bent link was not replaced. This testimony of Brownfield is corroborated by Cavanaugh who testified repairs were made almost daily [R. 119]. Brownfield's estimate does not include links broken and replaced in the night shift while the machine was in charge of another operator. It can thus be seen that the 123 links which defendants show they installed would not be sufficient to replace even at the rate of one a day, much less 4 or 5 or 6 a day. Our conclusion must be that, since it was only when the chain actually broke that a link was installed; bent, bowed, twisted and fractured links were allowed to remain in the machine when it was returned to plaintiffs. Culjak's description that when he first saw it on its return "all the chains were bent" seems to be an understatement. It is difficult to imagine even 9 or 10 links being serviceable under such conditions. When Brownfield testified that he installed "around 20 links" [R. 99], when the final repairs

were made at Fort Huachuca, he must have taken links which previously had been discarded.

Taking all the evidence we must be convinced, as we believe the Trial Court was at the conclusion of the evidence when he ordered written memoranda *only* upon plaintiffs' right to rent for the machine while being repaired, that the repairs made by plaintiffs were necessary.

POINT IV.

Seventh, Eighth and Tenth Assignments of Error.

What Was the Obligation of Defendants With Reference to Repairs of the Machine?

Conclusion of law 2 states that plaintiffs are not entitled to the damages prayed for in their complaint. The other assignments relate to errors of law in denying judgment for plaintiffs and in giving judgment for defendants.

It is to be assumed from this that the Court below must have found that the machine was not in need of repairs upon its return or, if it was, that defendants were not obligated to repair it.

The evidence shows that before any written contract was executed the machine was delivered to defendants upon assurance given to plaintiff Culjak that the machine was not to be operated on rocky ground [R. 29]. The leasing of the machine constituted a bailment for hire. The principles controlling a bailment for the mutual benefit of the bailor and the bailee were, therefore, applicable. Under such a bailment the bailee was required to exercise ordinary care and diligence with reference to the bailed article. *Mulvaney v. King Paint Co.*, 256 Fed.

612; *Crescent Bed Co. v. Jonas,* 206 Cal. 94, 273 Pac. 28; *Kittay v. Cordasco* (N. J.), 134 A. 667; *Moon v. First National Bank* (Pa.), 135 A. 114; *Western Machinery Exchange v. Northern Pac. Ry. Co.,* 142 Wash. 675, 254 Pac. 248. The degree of care to be exercised by the bailee in such case is the care which an ordinarily prudent person would bestow on his own property of a like description. *Webber v. Bank of Tracey,* 66 Cal. App. 29, 225 Pac. 41; *Fidelity Storage Co. v. Foster* (D. C.), 51 F. (2d) 439. As stated in a well-known text: "In general the bailee must always use well the property entrusted to him and he is also bound to exercise good faith in every matter in which the interests of the bailor may be affected. In accordance with this general principle, a bailee who has damaged the corpus of the bailment by disregarding the instructions of the bailor as to the use of the property must respond in damages." 8 *C. J. S.* 264, *Bailments,* Sec. 26, citing *Zell v. Dunkee* (Ky.), 75 S. W. (2d) 761; *Whitehead v. Johnson,* 268 N. Y. S. 368.

In bailments for the mutual benefit of bailor and bailee the bailee is responsible for repairs which are ordinary and incidental to the use. 8 *C. J. S.* 257, Sec. 24; *Schmidt-Hitchcock Contractors v. Dunning,* 38 Ariz. 360, 300 Pac. 183; *Harlan v. Paxton* (Ark.), 3 S. W. (2d) 1004; *Woodward v. Royal Carpet Cleaning Co.* (La. App.), 134 So. 443.

CONSTRUCTION OF THE CONTRACT.

The written contract was prepared by defendants. Any ambiguity in its language must be construed most strongly against them. 13 *C. J.* 544. The contract provided that after the receipt of the machine in a condition to render

efficient, economic and continuous service, the lessee was to make all necessary minor or field repairs thereon. This provision was but a paraphrase of the general rule requiring a bailee to make all ordinary or incidental repairs and to return the bailed article in the same condition as when received, ordinary wear and tear excepted. Field repairs must be understood to mean those repairs which would be incidental, or arise out of, or be caused by the particular field operations; in other words, those repairs which would be necessitated by reason of the particular use to which the machine was put in the field.

The contract stated, however, that repairs which were neither minor nor field were to be made by plaintiffs.

Minor Repairs.

Illustrations of minor repairs would be repairing and replacing minor parts such as bolts, nuts, pins, chain links, track pads, etc. Although such repairs might be "minor", they might also be "field" repairs, since they might be incidental to the operations.

Field repairs would include repairs which might be minor as well as those which might not be minor, provided they arose out of or were incidental to the field operations. Replacement of damaged links or damaged track pads injured in the field operations would undoubtedly be classed as field repairs, even though they might also be classed as minor repairs. The repair of the main shaft of the machine, because of excessive strain in the field operations, or because of the negligent use of the machine by the lessees, or because of some accident in the field operations, would unquestionably be a field repair, though not minor. The contract did not require plaintiffs

to make such class of repair. To so construe the contract would be tantamount to relieving defendants from all liability for their own negligent or reckless use of the machine. A provision of such a nature in a contract would be contrary to public policy and void. 8 *C. J. S.* 264, 265, 273.

It is, therefore, illogical to say that merely because a repair was major it was plaintiffs' duty to have it made, regardless of how such repair was necessitated; and it is equally illogical to assert that "other than minor or field repairs" means *all major repairs*. What the contract intended was that all repairs which could not be classed as ordinary or incidental, that is, minor or field, should be made by plaintiffs.

Other Than Minor or Field Repairs.

Suppose a main part of the machine, such as the boom or a vital shaft, had some latent defect or had become crystallized, and suppose such boom or shaft should break, through no fault of the lessees and while the machine was operating in ground to which it was adapted, undoubtedly, it would be the duty of the lessors to stand the expense of repairing or replacing such broken part, since that would be other than minor or field repairs.

Meaning of Terms in the Trade.

The foregoing was the meaning of the terms as understood in the contracting business where trenching machines are operated, as testified by the witnesses for both parties and among whom there was no contradiction on the matter. According to said witnesses the provision in the contract requiring the defendants to make all necessary minor or

field repairs meant that they were to keep the machine repaired and return it to plaintiffs in as good condition as when received, ordinary wear and tear excepted.

Culjak, who had been in the contracting business more than ten years and who had owned trenching machines all that time, testified:

> "As to the meaning of the words 'necessary minor repairs,' we consider in the contracting business anything that is damaged on a construction work should be replaced at the time it is damaged, and not wait until everything is gone; and as to 'field' repair that anything damaged in the field should be repaired right there and not wait until everything is gone. If a pad is damaged and bent and indented and spread out, the operator should stop right then and put in a new slat right there" [R. 123-124].

Devine, who had worked with practically all trenching machines since 1912 [R. 47], testified:

> "Minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop to fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation. I would say those injured or damaged pads were field repairs" [R. 128-129].

Lest it be said that the foregoing is the testimony of interested witnesses for plaintiffs only and, therefore, unconvincing, we now present the testimony of the defend-

ants' superintendent, Dan Cavanaugh, who had twenty years' experience in contracting business and who was familiar with trenching machines [R. 119]. He was asked by defendants' counsel: "Q. And what is meant in the trade by the phrase 'necessary minor or field repair'?" He answered: "A. Minor repairs, as I understand it, are repairs to keep the machine running." This answer, upon objection was stricken. Counsel for the defendants then asked: "Q. As generally used in the trade, what does that expression mean?" The witness answered: "A. It means to keep the machinery, the equipment running. The repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or something outside of the field shop" [R. 119-120]. On cross-examination this witness was asked: "Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into the condition it was when you got it, ordinary wear and tear excepted?" And his answer was: "A. Yes, sir. That is what I considered those terms to mean in effect."

"Minor" Versus "Major."

Apparently, the Court below was impressed by the expensiveness of the repairs made by plaintiffs after the machine was returned. Apparently, he thought the repairs made were "major" as finding of fact 9 declares. The repairs made by plaintiffs were but an accumulation of minor repairs which should have been made as the in-

juries occurred. If the defendants had fulfilled their duty under the contract and had replaced each bent or bowed or elongated link in the excavation chain as soon as it got in such condition, there would not have been 102 links in the chain "bent, drawn out of shape, or worn down to a point where they were dangerous to operate," as Mr. Collins reported to defendants [R. 75]. The cost of each of those links was only $4.90 [R. 78], a minor cost. The cost of 102 links was $499.80, a major cost. But that major cost was but the aggregate of 102 minor costs. If the contract required defendants to make all minor repairs, can they evade their liability by allowing the minor repairs to aggregate until they have multiplied more than a hundred fold?

If the defendants had fulfilled their duty under the contract and had replaced each damaged track pad as soon as it got in that condition, there would not have been "82 tractor pads all in very poor condition" as Collins reported [R. 75]. A single track pad would have cost only $14.20, a minor cost. The cost of replacing 82 track pads, exclusive of the cost of labor, was $1199.33, a major cost. Had each damaged track pad been replaced as soon as it became damaged, the individual repair would have been minor; but because the defendants recklessly drove the forty-ton machine over rocky terrain and over ground in which there were jutting rocks which broke and crushed the wooden fillers of the caterpillar pads, and indented and spread out of shape the steel casings of those wooden pads [R. 76, 105, 118, 121] and made no replacements of the damaged pads, there was a multiplication of the damaged units, the repair of the aggregate of which was a major repair.

The highest cost of any single part purchased by plaintiffs to make repairs on the machine after its return to them was for those tractor pads at $14.20 each [R. 68]. The total cost of all parts purchased for said repairs was $2134.28.

During the five months' period of operations, the defendants purchased for repair of the machine 1 single part costing $60.00; 1 costing $54.60; 1 costing $54.50; 1 costing $49.50; 1 costing $48.50; 1 costing $39.90; 1 costing $27.60; 3 costing $27.50 each; 1 costing $22.50; 3 costing $22.30 each, 2 costing $15.60 each; and 1 costing $15.40 [R. 24-26].

The aggregate cost, including labor, of the minor or field repairs shown to have been made by defendants was $4211.13. Contrast this with the total of $2666.80, which included labor, expended by plaintiffs for repair of the machine after its return. How can it be said that repairs costing $4211.13 are not major, while repairs costing the lesser amount of $2666.80 are major?

The list of repairs made by defendants [R. 24-26] indicates that they understood the contract as obligating them to replace at their own cost some of the identical parts which plaintiffs replaced after the machine was returned. Since said list also shows much costlier parts than the tractor pads as having been replaced by defendants, how can it be reasoned that the defendants felt themselves obliged to replace such costlier parts but not the tractor pads?

RENTAL OF MACHINE DURING REPAIRS.

The plaintiffs claim as damages rental for the machine during the time it was being repaired by them after its return. It is the settled rule in cases of this kind that the measure of a plaintiff's damages is the amount which will compensate him for all loss proximately caused by a defendant's default. 8 *C. J. S.* 364; 25 *C. J. S.* 598, 599. Thus, in *Southern Iron & Equipment Co. v. Smith* (Mo.), 192 S. W. 754, the court held that if the repairs were incidental to the use of the machine, the time lost in making the repairs was defendant's loss and not plaintiff's.

Here, again, the plaintiffs have been modest in their claim. It took 30 days before the parts ordered for the repairs could be delivered [R. 95] and it would have taken that long, any time between the middle of May and prior to July, 1941 [R. 96]. In reality, therefore, the machine was held up for 60 days, because it took 30 days to make the repairs after the parts were delivered [R. 38] and this was less than as estimated by Collins who said it would take 40 days [R. 95]. The plaintiffs, however, claim only for 30 days the rental of $1500.00, which was the rental provided in their contract with defendants, and which was less than the reasonable prevailing rental [R. 60, 91].

The evidence is uncontradicted that, if the machine were available during the thirty days it was being repaired, the plaintiffs could have rented it for not less than $1500.00 per month [R. 39-40, 60, 63].

Under the law and the undisputed facts, therefore, the plaintiffs were entitled to this item of damages in the amount of $1500.00, which, added to the damages expended for repairs, gives a total of $4166.80 for which plaintiffs should have been awarded judgment.

POINT V.

Ninth and Eleventh Assignments of Error.

Was There Abuse of Discretion by the Trial Court in Refusing to Allow a Trial Amendment of the Complaint and in Denying Plaintiffs' Motion for a New Trial?

TRIAL AMENDMENT OF PLEADINGS.

During the course of the trial counsel for defendants objected to certain testimony as to damages which were not specified in the bill of particulars. Thereupon, counsel for plaintiffs requested leave to amend the complaint to permit such proof. The Court granted the request on condition that a continuance would be granted to the defendants. Counsel for defendants refused to accept such condition. Thereupon, the Court sustained the objection to the testimony and counsel for defendants made an offer of proof that when the machine was returned to plaintiffs it was damaged in several particulars not specified in the bill of particulars to the extent of 10% or 11% of the value of the machine [R. 54-55].

It is respectfully submitted that the testimony offered of the additional damages was of the same general character as that offered with respect to the specific matters set forth in the bill of particulars. Defendants had already been apprised of such damages by the testimony of their own witnesses whose depositions were taken long before the date of the trial, particularly with reference to the damaged buckets [R. 110].

The Court imposed an unreasonable condition upon plaintiffs who were residents of Los Angeles County, California, who must have been put to much inconvenience,

loss of time and expense, at a time when government regulations made travel difficult, to attend the trial at Tucson, Arizona, and who probably felt that the amount involved in the claim for additional damages would not justify a duplication of such inconvenience, loss of time and expense.

Another trial amendment requested by counsel for plaintiffs was in relation to 30 additional excavator chain links which were installed in the machine upon its repair but which were not particularized in the bill of particulars. No objection was made to the testimony offered as to these additional links. An amendment was requested, but no order appears in the record of the granting of such request, although the trial proceeded as if the amendment had been allowed [R. 37]. [See Rep. Tr. p. 53.] The evidence was conclusive that a total of 180 links were installed.

Because of the inadvertence of not including the 30 additional links in the bill of particulars, the amount prayed for in the complaint was substantially less than the amount of damages conclusively proved. When the bill of particulars was filed, it became a part of the pleading which it supplements (Rule 12(c)).

Under the old rule, the law is, as stated in 49 *C. J.* 173:

> "However, under modern codes, practice acts, and other statutes regulating practice, where the rule is that the facts set forth, rather than the relief demanded, determine the relief which shall be granted, the prayer is unimportant, at least where an answer is filed, unless there is some ambiguity in the statement of facts, so that if plaintiff is entitled to some relief under the facts which he has set forth he will

be granted such relief, although he has prayed for relief to which he is not entitled, for more or less relief than he is entitled to, or for no relief whatever."

And the new rules, 54(c), provide:

"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Speaking of this rule, it has been said:

"If the appellant has stated a cause of action for any relief, it is immaterial what he designated it or what he has asked in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. Rule 54(c), Fed. R.P. See also *Atwater v. North American Case Corp.,* 36 Fed. Sup. 975, 977, (2 Fed. Rules Service, 89.25, Case 2.)"

Kansas City ,etc. v. Alton R. Co. (C. C. A. 7), 124 F. (2d) 780.

"The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Rule 61.)

We think the Court should have allowed the amendment without imposition of the harsh condition; but whatever may be said in defense of the Court's order in that respect, cannot apply to the item of 30 additional excavator chain links, testimony as to the installation of which was received without objection.

Conclusion.

We have shown by the foregoing discussion that the plaintiffs leased to defendants a trenching machine upon the representation of defendants that it was not to be used in rocky or stony ground.

We have shown that when the machine was delivered to defendants, it was in first-class condition throughout.

We have shown that it was the duty of defendants to maintain it in that condition by making thereon all necessary minor or field repairs and to return it to plaintiffs in that condition, ordinary wear and tear excepted.

We have shown that defendants used the machine on extremely rocky ground to which it was not adapted, that they ran it over ground with jutting rocks which greatly damaged its caterpillar track pads, and that they operated it to excavate rocks which damaged and destroyed its entire 180 excavator chain links.

We have shown that, while defendants expended a substantial sum in making minor or field repairs during the period said machine was in use by them, when they returned it to plaintiffs it was in a greatly damaged condition, and not in the first-class condition in which it was received, ordinary wear and tear excepted, and that all necessary minor or field repairs had not been made thereon.

We have shown that plaintiffs after the return of said machine endeavored to have defendants make such minor or field repairs on the machine as were necessary and as would restore it to efficient, economic and continuous working condition, but that defendants refused to do so.

We have shown that plaintiffs expended the sum of $2666.80 upon necessary minor or field repairs which defendants should have made on said machine, and that said sum was the reasonable cost of said repairs.

We have shown that while said machine was being repaired, plaintiffs could have rented it at $1500.00 per month and that such rental was the reasonable market rental of said machine at that time.

We have shown that the Court below erred in failing to award judgment to plaintiffs for $4166.80 or for any sum.

We have shown that all the competent and material evidence before the Court supported the claim of plaintiffs and that said evidence was undisputed.

We, therefore, respectfully ask that the judgment of the Court below be reversed and that plaintiffs be awarded judgment by this Court for $4166.00.

Respectfully submitted,

FRANK J. BARRY,
Los Angeles, California;
CONNER & JONES,
By GERALD JONES,
Tucson, Arizona,
Attorneys for Appellants.

Dated: July 13, 1944.